

# American Workers' Compensation

- I. Mission – an appreciation for the breadth of career paths available in workers' compensation, knowledge of economic foundations, legal evolution, and influencing factors.
- II. Learning Objectives
  - A. Social foundations
    - 1. Society's transition from agrarian primacy
    - 2. America's Indigenous, English, French, and Spanish foundations.
    - 3. Industrialization, westward expansion, economic innovation
  - B. Legal foundations
    - 1. The relatively short existence of American jurisprudence
    - 2. The origins of American law
    - 3. Interactions between statute and common law
    - 4. Torts, Contracts, and the legislative compromise
      - a. Negligence – Duty, breach, damage, and causation
      - b. Contracts – Offer, acceptance, consideration, legality
  - C. Workers' compensation
    - 1. History
      - a. German Roots and English intertwining
      - b. American foundations
      - c. Interrelationship with industrial revolution
    - 2. Function
      - a. Medical remediation
      - b. Replacement of earnings
- III. Interactions
  - A. The field of workers' compensation encompasses a variety of college degrees, specialized certificates, and professional designations. It involves dynamic career paths, attracts varied personalities, and provides exceptional opportunities for both reward and growth.

# Foundational Concepts

## Workers' Compensation Historical Overview

American workers' compensation is a community centered on a broad concept that each state has legislatively adopted. Occupations in that community include actuaries, claims professionals, lawyers, nurses, physicians, programmers, risk professionals, safety professionals, therapists, and more. These focus on the care and treatment of worker injuries, facilitation of recovery and remediation, return to gainful employment when practical, and dealing with impairment and disability. These programs protect about 135 million American workers.<sup>1</sup>

Workers' compensation is said to be a derogation<sup>2</sup> of the Common Law. It is a process of statutory adjustment to the law, changing the rights and responsibilities of employees and employers. The story of American workers' compensation is relatively young. Its origins are rooted in the German confederation (Prussia), as it evolved into the German Empire in the 1870s.<sup>3</sup> There was a perception that workers struggled to receive compensation for work injuries. Some conclude this was because "common law principles were quite restrictive."<sup>4</sup> That said, the legal history may be more complex. The Common Law is an English process, thus such issues of the Common Law may have stimulated interest in adoption of that country's workers' compensation, and even the later efforts in America. All the same, the birth in the German Empire, in Prussia, suggests that the stimuli were more likely codified, statutory, complications or perceptions instead of specifically "common law."

The modern concept began with Prussian (modern Germany) Chancellor Otto von Bismarck. With designs on imperial authority, and facing domestic unrest from socialists and Marxists, he enacted the Employers' Liability Law of 1871, which benefitted specific categories of workers or industries.<sup>5</sup> He later adopted a broader social safety net in 1884 - Workers' Accident Insurance.<sup>6</sup> The 1871 law affords Germany credit for originating the workers' compensation idea, and the 1884 for realizing it. England adopted its Employer's Liability Act in 1880. This was an adaptation of the Prussian idea, "abolished the old common-law defenses in theory,"<sup>7</sup> and somewhat simplified worker recovery. It was not really workers' compensation, but its passage may have encouraged the Prussian 1884 effort.

English workers' compensation came in 1893. It established "a 'no-fault' doctrine of compensation," and had similarities to Prussia's 1884 law. A critical twist, however, was that the English allowed private insurance a role while Germany's system was a state program. This is

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<sup>1</sup> STATISTA, November 22, 2023; <https://www.statista.com/statistics/194835/number-of-us-workers-covered-by-workers-compensation-per-month/>; ("In 2020, about 135.57 million workers were covered by worker's compensation in the United States").

<sup>2</sup> Derogation – "a taking away or detraction from something (as the force of a law)." MERIAM-WEBSTER ONLINE, <https://www.merriam-webster.com/legal/derogation>

<sup>3</sup> *The German Empire, 1871–1914*, BRITANNICA, <https://www.britannica.com/place/Germany/Germany-from-1871-to-1918>

<sup>4</sup> Gregory P Guyton, *A Brief History of Workers' Compensation*, Iowa Orthop J. 1999; 19: 106–110; <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1888620/>

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

the initial friction between control and free market, and instances of this persist today. Coincidentally, when American workers' compensation was born, states adopted either "competitive" (insurance) programs in the English model or "monopolistic" (government) programs more similar to the Germany theme. Though "competitive" is presently predominant, four states maintain monopolistic programs: North Dakota, Ohio, Wyoming, and Washington.<sup>8</sup>

There are significant career opportunities in the workers' compensation community. There is a present generational shift that will persistently afford significant career opportunities in fields associated with workers' compensation over coming decades. These include varied backgrounds, licensure, certification, and skills. Some examples are:

	<u>Salary</u>	<u>Need (through 2032)</u>
Claims Insurance Professionals	\$46-\$110,000 <sup>9</sup>	21,500 annually
Human Resource Manager	\$64,240 <sup>10</sup>	51,400 total growth
Attorneys	\$135,740 <sup>11</sup>	62,400 total growth
Nurse Case Managers		
Vocational Rehab. Professionals		
Medical Office Business Staff		
Risk Managers		

American workers' compensation might thus be viewed as a European transplant. However, a historical review illustrates a confluence of economic shifts, industrialization, and legal evolution that formed a foundation for socialistic American injury compensation programs followed by extensive expansion of worker rights throughout the 20<sup>th</sup> century.<sup>12</sup>

## Review of American History

### First inhabitants of North America

While there remains debate, it is likely that humans have inhabited North America for at least 20,000 years,<sup>13</sup> perhaps even 40,000 years.<sup>14</sup> There is evidence of

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<sup>8</sup> Marianne Bonner, *Workers Compensation Insurance in Monopolistic States*, The Balance, November 29, 2022, <https://www.thebalancemoney.com/workers-compensation-insurance-in-monopolistic-states-462813#>

<sup>9</sup> <https://www.bls.gov/oes/current/oes131031.htm>

<sup>10</sup> <https://www.bls.gov/ooh/business-and-financial/human-resources-specialists.htm>

<sup>11</sup> <https://www.bls.gov/ooh/legal/lawyers.htm>

<sup>12</sup> Worker right expansion is the subject of the second in this series of expository essays.

<sup>13</sup> Steve Moyer, *The First Americans*, HUMANITIES, March/April 2014, Volume 35, Number 2, <https://www.neh.gov/humanities/2014/marchapril/feature/the-first-americans>

<sup>14</sup> Simon Worrall, *When, How Did the First Americans Arrive? It's Complicated*, National Geographic, June 8, 2018, <https://www.nationalgeographic.com/science/article/when-and-how-did-the-first-americans-arrive--its-complicated->

sophisticated governments,<sup>15</sup> property ownership,<sup>16</sup> and judicial systems.<sup>17</sup> While there were complex communities, there is evidence that many or most of those people were engaged in farming,<sup>18</sup> though there is evidence to support some hunter/gatherers. Thus, agrarian foundations permeate occupation of this continent. Despite this, there is evidence of sophistication and complexity.<sup>19</sup>

### European Colonization

Conventional wisdom for centuries has acknowledged Christopher Columbus' primacy.<sup>20</sup> However, evidence can be cited supporting "Irish Monks" in the sixth-century and Leif Erikson in the tenth century (1000 A.D.). Some even believe that the first "discoverers" of America were the Chinese in the fifteenth century (1421).<sup>21</sup> Though debate may continue as to the first European arrivals, their colonization is clearer.

"Britain, France, Spain, and the Netherlands established colonies in North America. Each country had similar, but at times distinct motivations for colonization and expectations about the potential benefits."<sup>22</sup>

Some sought trading routes: "The rise in power of the Ottoman Turks and the decline of the Mongol Empire disrupted traditional trade routes,"<sup>23</sup> turning eyes west.

Wealth was a motivator, but "In addition to the quest for gold, however, Spain sought to spread Christianity."<sup>24</sup> French, interests included Protestantism.<sup>25</sup>

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<sup>15</sup> *Native American Governments*, Public Broadcasting Service, November 24, 2021, <https://www.pbs.org/video/native-american-governments-tj1tffi/#>

<sup>16</sup> Livia Gershon, *Yes, Americans Owned Land Before Columbus*, JStor Daily, March 4, 2019, <https://daily.jstor.org/yes-americans-owned-land-before-columbus/>; Prehistoric farmers, Britannica, n/Prehistoric-farmers

<sup>17</sup> Lisa Jaeger, *Types and History of Tribal Courts A Brief Summary*, Tanana Chiefs Conference, March 2000; <https://publicdocushare.tananachiefs.org/docushare/dsweb/Get/Document-3569/History-of-Tribal-Courts.pdf>

<sup>18</sup> Livia Gershon, *Yes, Americans Owned Land Before Columbus*, JStor Daily, March 4, 2019, <https://daily.jstor.org/yes-americans-owned-land-before-columbus/>; Prehistoric farmers, Britannica, n/Prehistoric-farmers

<sup>19</sup> Stéphen Rostain, Antoine Dorison, Geoffroy De Saulieu, Heiko Prümers, Jean-Luc Le Pennec, Fernando Mejía Mejía, Ana Maritza Freire, Jaime R. Pagán-Jiménez, And Philippe Descola, *Two thousand years of garden urbanism in the Upper Amazon*, SCIENCE, 11 Jan 2024, Vol 383, Issue 6679, pp. 183-189, (Size "comparable to the estimated population of Roman-era London").

<sup>20</sup> *Christopher Columbus*, History.com, November 9, 2009, <https://www.history.com/topics/exploration/christopher-columbus>

<sup>21</sup> Eric Weiner, *Coming to America: Who Was First?*, National Public Radio, October 8, 2007, <https://www.npr.org/2007/10/08/15040888/coming-to-america-who-was-first>

<sup>22</sup> Motivations for Colonization, National Geographic, <https://education.nationalgeographic.org/resource/motivations-colonization/>

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Fort Caroline National Memorial, United States Park Service, <https://www.nps.gov/articles/ftcaroline.htm#>

France's quest for wealth focused on resources other than gold. Cartier made French claims to North America in 1543, but in 1608 de Champlain "founded the first French settlement of Quebec."<sup>26</sup> Their focus was on fur trade.

Often forgotten, the Dutch established New Netherland, "purchased the island of Manhattan from the Native Americans in 1626 and renamed it New Amsterdam." Their focus was similarly on fur trading, but immigrant "Farmers and merchants followed."<sup>27</sup> Dutch success was short-lived, however. In 1664, Britain took over the colony of New Netherland and renamed it New York.<sup>28</sup>

"England was motivated in part by the lure of both riches and the Northwest Passage."<sup>29</sup> The Virginia Company was granted a charter to colonize by King James in 1606. Profit was the primary motivator, but religion drove immigration,<sup>30</sup> Jamestown, and permanent residency in 1620.

The British, French, and Spanish continued to compete for territory and trade over the next century, leading toward American independence. In the aftermath of the War of Independence came the Louisiana Purchase (1803),<sup>31</sup> and eventually, American acquisition of Florida.<sup>32</sup>

There were many armed conflicts between and among these colonial powers, as there likely were with and among the previously-existing civilizations. Disputes included access to resources and space, as well as religious differences.

The European colonists were largely agrarian also. In 1776, about 90% of Americans were.<sup>33</sup> In 1870, about 100 years post-independence, "almost 50 percent of employed persons (in America) worked in agriculture."<sup>34</sup> The volume of farms peaked in 1935 and dropped precipitously thereafter through 1974. Through the 1900s, "Rapidly falling farm numbers ... reflected growing productivity in agriculture and increased nonfarm employment opportunities."<sup>35</sup> Each was likely influenced by

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<sup>26</sup> See note 22.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Joshua J. Mark, *Religion in Colonial America*, *WORLD HISTORY ENCYCLOPEDIA*, April 12, 2021; <https://www.worldhistory.org/article/1726/religion-in-colonial-america/#> ("separatists and Puritans seeking to establish religious communities in which they could worship freely").

<sup>31</sup> The Editors of Encyclopaedia. *Louisiana Purchase*. *ENCYCLOPEDIA BRITANNICA*, 17 Oct. 2023, <https://www.britannica.com/event/Louisiana-Purchase>. Accessed 17 December 2023.

<sup>32</sup> *Acquisition of Florida: Treaty of Adams-Onis (1819) and Transcontinental Treaty (1821)*, U.S. Department of State, Office of the Historian, <https://history.state.gov/milestones/1801-1829/florida#>

<sup>33</sup> Elvin F. Frolik, *The History of Agriculture in the United States Beginning With the Seventeenth Century* (1977). Transactions of the Nebraska Academy of Sciences and Affiliated Societies. <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1456&context=tnas>

<sup>34</sup> Patricia A. Daly, *Agricultural employment: has the decline ended?* *MONTHLY LABOR REVIEW*, November 1981, <https://www.bls.gov/opub/mlr/1981/11/art2full.pdf>

<sup>35</sup> *The number of U.S. farms continues slow decline*, U.S. Department of Agriculture, Economic Research Service, <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58268>

industrialization. By 1980, Americans earning a living from farming had declined to 4 percent.<sup>36</sup>

### Industrial revolution and migration to cities

The Industrial revolution (1760-1849<sup>37</sup>) contributed to this in both facilitating farmer productivity and accelerating growth and opportunity in an assortment of non-farm occupations. The breadth of these 90 years is notable, but the latest portion of the period is particularly notable for innovation.<sup>38</sup> The coincidence of timing between the end of this period and the earliest workers' compensation history in Germany is noteworthy.

There was a "second" industrial revolution (1870-1914).<sup>39</sup> This featured coordination of invention and science. There were "great pathbreaking inventions in energy, materials, chemicals, and medicine."<sup>40</sup> As important as the first was, "no period introduced more changes than the Second Industrial Revolution. From the late 19th to early 20th centuries"<sup>41</sup> These impacted society, industry, production, and economic growth. The birth of American workers' compensation is similarly coincidental with the final years of this second revolution.

Contemporaneous with the industrialization was an American urbanization. This included a migration from rural areas to existing cities, "like Chicago and New York." However, there was also a very significant "internal industrialization of rural counties," in which new industrial centers were born and developed across the county. As agrarian employment decreased, "between 1880 and 1940, 240 new incorporated cities sprang up."<sup>42</sup>

The most recent revolution has been labelled the "information revolution," generally beginning in the mid-1980s.<sup>43</sup> This has been marked by "radical changes . . . on the storage of and access to information,"<sup>44</sup> This has had direct effects in terms of occupations in information science, infrastructure, architecture, interaction, and security. However, the implications have been far broader affecting every economic segment, occupation, business, and worker. As such, they have impacted workers' compensation directly and by implication.

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<sup>36</sup> See note 34.

<sup>37</sup> *Industrial Revolution*, ENCYCLOPEDIA BRITANNICA, 15 Nov. 2023, <https://www.britannica.com/money/topic/Industrial-Revolution>. Accessed 16 December 2023.

<sup>38</sup> *Industrial Revolution*, History.com, October 29, 2009, ("the Industrial Revolution began in earnest by the 1830s and 1840s in Britain.") <https://www.history.com/topics/industrial-revolution/industrial-revolution>

<sup>39</sup> Joel Mokyr, *The Second Industrial Revolution, 1870-1914*, Northwestern University, August 1998, <https://faculty.wcas.northwestern.edu/jmokyr/castronovo.pdf>

<sup>40</sup> *Id.*

<sup>41</sup> Eric Niiler, *How the Second Industrial Revolution Changed Americans' Lives*, History.com, January 25, 2019, <https://www.history.com/news/second-industrial-revolution-advances>

<sup>42</sup> *Urbanizing the US: From Agriculture to Manufacturing to Services*, The digest: no. 3, March 2023, National Bureau Of Economic Research, <https://www.nber.org/digest/2023/urbanizing-us-agriculture-manufacturing-services>

<sup>43</sup> *Information Revolution*, A DICTIONARY OF WORLD HISTORY, Oxford University Press, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100003639>

<sup>44</sup> *Id.*

## **Overview of the Law**

In a gross oversimplification, the law can be divided into two broad categories of code and common law.

### **Civil Law**

The “Code of Hammurabi was one of the earliest and most complete written legal codes.”<sup>45</sup> It was the law in Babylon (part of modern Iraq and perhaps Syria). The Code dates to King Hammurabi (1792 to 1750 B.C.)(over 3,800 years ago).<sup>46</sup> One early code, “The Nippur Tablet No. 3191 from ancient Sumeria” (southern part of modern Iraq), dating “to approximately 2050 B.C.” included “monetary compensation for specific injury to workers’ body parts, including fractures.”<sup>47</sup> Thus the idea of workers’ compensation has some foundation in the earliest of code law.

Roman Law was established beginning in 753 BCE<sup>48</sup> (over 2,770 years ago), and continued until sometime in the 5<sup>th</sup> Century.<sup>49</sup> What evolved from those beginnings has been described as “code” or “civil” law. This evolution included the “Code of Justinian (Corpus Juris Civilis) by the emperor Justinian I”<sup>50</sup> (527 to 651). Its evolution continued through the Middle Ages (466 to 1450 A.D.<sup>51</sup>), feudalism, the Roman Church canon law, and the Holy Roman Empire<sup>52</sup> (Germanic - 962 to 1806<sup>53</sup>).<sup>54</sup> Germany was thus a significant contributor to Code law. Though its influence in continental Europe has been significant, the Germanic influence in America has been more indirect, through that broader European influence, and the colonization by the French and Spanish. This has influenced the U.S. because “Roman law strongly influenced the law of contracts and torts.”<sup>55</sup> Code origins and evolution are long and deep. In those roots there is history of procedure, evidentiary rules, and substance.

### **Common Law**

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<sup>45</sup> *Code of Hammurabi*, History.com, November 9, 2002, <https://www.history.com/topics/ancient-middle-east/hammurabi>

<sup>46</sup> *Id.*

<sup>47</sup> Gregory P Guyton, *A Brief History of Workers' Compensation*, IOWA ORTHOP J. 1999; 19: 106–110; <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1888620/>

<sup>48</sup> BCE refers to “Before Common Era,” or “before Christian Era,” see *B.C.E.* CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/bce>

<sup>49</sup> Albert Roland Kiralfy, Peter G. Stein, John N. Hazard, *Roman Law*, BRITANNICA, <https://www.britannica.com/topic/Roman-law>

<sup>50</sup> Max Rheinstein, Mary Ann Glendon, Paolo Carozza, *Civil Law*, BRITANNICA, <https://www.britannica.com/topic/civil-law-Romano-Germanic>

<sup>51</sup> *Middle Ages*. ENCYCLOPEDIA BRITANNICA, 17 Nov. 2023, <https://www.britannica.com/event/Middle-Ages>. Accessed 17 December 2023. (“from the collapse of Roman civilization in the 5th century CE to the period of the Renaissance (variously interpreted as beginning in the 13th, 14th, or 15th century, depending on the region of Europe.”)

<sup>52</sup> Voltaire famously noted that “This agglomeration which was called and which still calls itself the Holy Roman Empire was neither holy, nor Roman, nor an empire.”

<sup>53</sup> Simon Duits, *Holy Roman Empire*, WORLD HISTORY ENCYCLOPEDIA, June 9, 2021, [https://www.worldhistory.org/Holy\\_Roman\\_Empire/](https://www.worldhistory.org/Holy_Roman_Empire/)

<sup>54</sup> See note 50.

<sup>55</sup> *Id.*

Common law is a “customary law, based upon judicial decisions and embodied in reports of decided cases.”<sup>56</sup> Decisions in each instance or dispute are rendered in accordance with, or with deference to, prior decisions in similar cases. This is the foundation of modern British law, and originated in “the common-law courts of England since the Middle Ages.”<sup>57</sup> However, there was evolution in that law, from a procedural foundation to substantive law “developed primarily by judges rather than legislators.”<sup>58</sup> The evolution and primacy of common law in “England was largely created in the period after the Norman Conquest of 1066,”<sup>59</sup> and during Britain’s emergence into the Renaissance. There were centuries of Roman influence in England, and evolution to Common law is complex in its retention, adaptation, and integration of those influences.<sup>60</sup>

### **American Law**

American law is significantly modeled on English law, the Common Law, based on the colonial period beginning in 1606, through independence in 1776, the 1783 conclusion of the War of Independence, and the 1789 ratification of the U.S. Constitution. American law then charts its own course from Common Law foundations with the various legislatures enacting statutory, “code” alterations to that foundation. This evolution was influenced by the American Constitutional foundation, including separation of powers (which exists in parallel in both federal and state governments), and the federalism “invented by the American founders”<sup>61</sup> that is foundational to the law. This federalism is critical to the adoption and evolution of more than 50 workers’ compensation systems in the U.S., a distinction from centralized control in Britain, Germany, and elsewhere.

The heredity of English law brought with it the foundational concepts of torts and contracts. These are each civil law concepts (contrasted with criminal law by which government regulates behavior through punishment). Civil law provides for “the entitlement of someone to claim a remedy from the person who has wronged them” and “is a generic feature of private legal relationships.”<sup>62</sup> A major distinction between them is privity. In contract disputes, the parties most often have a previous relationship with each other before the breach (the event giving rise to recovery of damages). Tort is not distinct in that privity is never present in tort, but in that it is most often not required. The two concepts have coexisted and been largely complimentary. As the law evolved, they developed distinctions notably in the early 19<sup>th</sup> century (1800s).<sup>63</sup> While they offer distinct legal foundations, they continue to include significant interaction.

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<sup>56</sup> Mary Ann Glendon, Andrew D.E. Lewis, Albert Roland Kiralfy, *Common Law*, BRITANNICA, <https://www.britannica.com/topic/common-law>

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *The Emergence of the Common Law of England*, Venteicher Rare Book Room, Creighton University School of Law, <https://culibraries.creighton.edu/rarebook/commonlawofengland>

<sup>61</sup> *Why Federalism?* Center for Exploring Federalism, <https://federalism.org/explore-federalism/>

<sup>62</sup> *Theories of the Common Law of Torts*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, June 2, 2022, <https://plato.stanford.edu/entries/tort-theories/>

<sup>63</sup> Lord Philp Sales, *Exploring the Interface Between the Common Law of Tort and Statute Law*, Annual Richard Davies Lecture For the Personal Injuries Bar Association, November 29, 2023 <https://www.supremecourt.uk/docs/speech-231129.pdf>

As the common law evolved, liability concepts were developed. These included “respondeat superior,”<sup>64</sup> “fellow-servant,”<sup>65</sup> contributory negligence,<sup>66</sup> and assumption of the risk.<sup>67</sup> These made the employer liable for (in)actions of the employee, governed liability when employees hurt each other, and held injured people to answer for their contribution to an injury. As they evolved and were refined, they affected the employer/employee relationship. In summary, the common law of injury, privity, contract, and tort could be involved and difficult. Some might instead say convoluted, confusing, and even confounding.

## **The Pirate connection**

The European evolution and American adaptation in the 19<sup>th</sup> and 20<sup>th</sup> centuries epitomize modern workers’ compensation. However that history “leaves out a much earlier piece of history.” In the 17<sup>th</sup> century “a form of worker’s compensation”<sup>68</sup> was adopted by privateers<sup>69</sup> in the Caribbean. A familiar example is Captain Henry Morgan,<sup>70</sup> who has often been described instead as a “pirate.” On his ship, there was a “law that all of the Captain’s pirates followed. These include a detailed loss-of-limb schedule – remarkably similar to those used in most states today.”<sup>71</sup> The concept of providing compensation to the maimed therefore existed in the New World a hundred years before Otto Von Bismarck’s foundation of 1871.

## **Birth of Insurance**

With the idea of loss came the desire for mitigation and avoidance. At its heart, insurance is a socialization of risk. Some confuse it with gambling, and there is room for debate in

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<sup>64</sup> *Respondeat Superior*, Legal Information Institute, Cornell University (“holds an employer or principal legally responsible for the wrongful acts of an employee or agent”), [https://www.law.cornell.edu/wex/respondeat\\_superior](https://www.law.cornell.edu/wex/respondeat_superior); This has historical foundation in Roman law, see John Osgood Chapin, *The Development of the Fellow Servant Doctrine* (1895). Historical Theses and Dissertations Collection. Paper 74,

[https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1068&context=historical\\_theses](https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1068&context=historical_theses)

<sup>65</sup> *Creation of a Common Law Rule: The Fellow Servant Rule, 1837-1860*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, Vol. 132:579, 1984, (“It carved out an exception to the well-established rule of respondeat superior, and relieved employers of liability for injuries negligently inflicted by any employee upon a “fellow servant.””)

<sup>66</sup> *Contributory negligence*, Legal Information Institute, Cornell University (“tort rule which bars plaintiffs from recovering for the negligence of others if they too were negligent in causing the harm.”).

[https://www.law.cornell.edu/wex/contributory\\_negligence](https://www.law.cornell.edu/wex/contributory_negligence)

<sup>67</sup> *Assumption of the risk*, LEGAL INFORMATION INSTITUTE, Cornell University (“Potential plaintiffs sometimes take the risk of injury onto themselves and absolve potential defendants from any liability”).

[https://www.law.cornell.edu/wex/assumption\\_of\\_risk](https://www.law.cornell.edu/wex/assumption_of_risk).

<sup>68</sup> Elaine Weiss, *How do today’s injured workers fare, compared to yesterday’s pirates?*, NATIONAL ACADEMY OF SOCIAL INSURANCE,

<https://www.nasi.org/discussion/how-do-todays-injured-workers-fare-compared-to-yesterdays-pirates/>

<sup>69</sup> *Privateer*, BRITANNICA, July 20, 1998, <https://www.britannica.com/technology/privateer> (A privateer was a “privately owned armed vessel commissioned by a belligerent state to attack enemy ships, usually vessels of commerce.”)

<sup>70</sup> *Sir Henry Morgan*, BRITANNICA, July 20, 1998, (“Welsh buccaneer, most famous of the adventurers who plundered Spain’s Caribbean colonies during the late 17th century. Operating with the unofficial support of the English government, he undermined Spanish authority in the West Indies”),

<https://www.britannica.com/biography/Henry-Morgan-Welsh-buccaneer>

<sup>71</sup> See note 68.

that regard. To some extent an insurer is gambling that there will be no covered loss. That said, any personal or individual potential for loss can be socialized so that cost is distributed over a broader population. The “first evidence of insurance appeared in China around 3000 BC when merchants would divide their cargo into several ships, protecting their investments and dividing any losses among themselves.”<sup>72</sup>

In “1750 BC the Babylonians devised a system where the merchant would borrow money to finance his shipment of goods. He paid the lender an additional sum of money and in exchange for this additional sum, the lender agreed to cancel the loan should the shipment be lost or stolen. This system was recorded in the Code of Hammurabi around 1750 BC.”<sup>73</sup>

However, it was around the 16<sup>th</sup> century “that insurance, as we know it was invented, developed as a mechanism particularly in response to the needs of merchants — not necessarily to protect their flesh, but to protect their wealth,”<sup>74</sup> as notably memorialized by William Shakespeare.<sup>75</sup>

In the American workers’ compensation system, the existence and intricacies of insurance plays a significant role.

### **Birth of railroads**

Railroads were intertwined in America’s economic evolution. The Baltimore and Ohio railroad was “the first regular carrier of passengers and freight.”<sup>76</sup> Further innovation by the South Carolina Canal and Railroad Company led some to conclude that it was Christmas 1830 that “the modern railroad industry was born.”<sup>77</sup> Not until post-Civil War would there be a transcontinental railroad, when The Union Pacific and the Central Pacific “met at Promontory Point, Utah, on May 10, 1869.” Railroads played a central role in the evolution of the U.S. and the economic shifts through the 19<sup>th</sup> and 20<sup>th</sup> centuries. There is evidence supporting the role of railroads in the major industrialization and urbanization of that era.

Railroads are also critically intertwined with the birth and evolution of workers’ compensation. “In 1908, when the American rail transportation system was still developing and the railroad industry was the largest employer in America, Congress enacted the Federal Employers’ Liability Act (FELA).”<sup>78</sup> This was the first successful American social insurance, though it followed the initial efforts at workers’

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<sup>72</sup> Lloyd Harger, *Workers' Compensation, A Brief History*, Florida Division of Workers' Compensation, <https://www.myfloridacfo.com/division/wc/infofaqs/history>

<sup>73</sup> *Id.*

<sup>74</sup> *From ‘the merchant of Venice’ to our time - Climate insurance tales*, United Nations Development Programme, <https://undp.medium.com/from-the-merchant-of-venice-to-our-time-climate-insurance-tales-ba3b278fddeb>

<sup>75</sup> William Shakespeare, 1564-1616. *THE MERCHANT OF VENICE*. Harlow, Essex, England: Longman, 1994.

<sup>76</sup> *Rise of Monopolies, The History of American Railroads*, Stanford University, [https://cs.stanford.edu/people/eroberts/cs181/projects/corporate-monopolies/development\\_rr.html#](https://cs.stanford.edu/people/eroberts/cs181/projects/corporate-monopolies/development_rr.html#)

<sup>77</sup> *Id.*

<sup>78</sup> Victor E. Schwartz, Liberty Mahshigian, *The Federal Employers' Liability Act, a Bane for Workers, a Bust for Railroads, a Boon for Lawyers*, *SAN DIEGO LAW REVIEW*, VOL. 23: 1. 1986, <https://digital.sandiego.edu/cgi/viewcontent.cgi?article=1569&context=sdlr#>

compensation. It is fair to say that FELA has fans and critics. But it is also only fair to acknowledge its timing and influence.

## **Labor Unions**

The relations between industry and labor in the early 20<sup>th</sup> century might be characterized in many ways. The era brought “the most famous, influential, and enduring of all muckraking novels, *The Jungle*,”<sup>79</sup> which “was an exposé of conditions in the Chicago stockyards.”<sup>80</sup> The first U.S. labor union dates to 1827<sup>81</sup> (in the midst of the first industrial revolution, *above*). In 1886, reasonably coincident with the Von Bismark’s struggle with Marxists and first statutory efforts, *above*, the American Federation of Labor formed. Following the first World War, U.S. American socialism expanded markedly with The New Deal. In 1935,<sup>82</sup> the Committee for Industrial Organization (CIO) formed and expanded the scope of organized labor. Thus, the expansion of socialistic ideals and organized labor is interwoven in American workers’ compensation, because it is part of the employer/employee relationship either actually or potentially in so much of the nation.

## **Triangle Shirt Waist**

In the midst of efforts to adopt American workers’ compensation, on March 25, 1911, an industrial disaster punctuated public perception of workplace safety. A factory was located on three floors of a New York City high-rise. That arrangement is not what modern America thinks of with a “factory,” but such land-use was not uncommon in that era of evolution. The employees there were predominantly young, female, and immigrant. A following investigation faulted design (door operation), negligence (doors were locked to prevent theft), inadequacy (one fire escape), and planning (fire equipment was not capable of reaching those floors). A fire late in the day resulted in 146 deaths.<sup>83</sup> “The Triangle factory fire remained the deadliest workplace tragedy in New York City’s history until the terrorist attacks on the World Trade Center 90 years later.”<sup>84</sup> The American Society of Safety Engineers (ASSE, now known as ASSP)<sup>85</sup> was founded soon after, and America embarked on a century of workplace safety focus. The establishment and adoption of workers’ compensation laws is inextricably tied to this disaster an tragedy.

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<sup>79</sup> Lohnes, Kate. *The Jungle*, Encyclopedia Britannica, 27 Oct. 2023, <https://www.britannica.com/topic/The-Jungle-novel-by-Sinclair>. Accessed 17 December 2023.

<sup>80</sup> *Id.*

<sup>81</sup> *Labor Movement*, History Channel, October 29, 2009, <https://www.history.com/topics/19th-century/labor>

<sup>82</sup> *Id.*

<sup>83</sup> “*The worst day I ever saw*,” Occupational Safety and Health Administration, March 25, 2011, <https://www.osha.gov/aboutosha/40-years/trianglefactoryfireaccount>

<sup>84</sup> *Id.*

<sup>85</sup> <https://www.assp.org/>

Francis Perkins was a contemporary labor activist and lobbyist. She witnessed the Triangle fire, and participated in workplace safety efforts. She was Franklin Roosevelt's "Secretary of Labor and the first woman to serve as a cabinet secretary."<sup>86</sup> She is credited with various aspects of The New Deal, workplace safety regulation and legislation, and advocated for "compensation in case of injury."<sup>87</sup> Her pioneering status and marked impacts have endeared her memory to the workers' compensation community.

### **Modern Workers' Compensation**

Evolving toward the 20<sup>th</sup> century, America was somewhat novel, novice, and challenged. In the wake of what remains the deadliest war in U.S. history,<sup>88</sup> America was in the midst of continental expansion, revolutionary change in human rights, a massive shift from agrarian to industrial economy, and persistent immigration. The first workers' compensation laws were early in the 20<sup>th</sup> century, Maryland was first in 1902.<sup>89</sup> The story is replete with women activists: Francis Perkins, and "advocates like Crystal Eastman and Jane Addams, with help from President Roosevelt,"<sup>90</sup> who "helped call attention to the catastrophic numbers of serious injuries suffered, mostly uncompensated, by American laborers."<sup>91</sup> Despite Maryland's primacy, the courts concluded that bill unconstitutional. In "1911 Wisconsin becomes first state . . . to adopt a true 'workman's' (sic) compensation law."<sup>92</sup> This was referred to as the "Great Trade Off,"<sup>93</sup> in which employers and employees mutually renounced rights in exchange for coinciding benefits. This has become colloquialized as "the Grand Bargain," though historical foundations for that characterization have proven elusive.

There are often good natured debates regarding the Maryland effort, the FELA, and Wisconsin. In the 21<sup>st</sup> century, there is some degree of pride and puffery in discussions of who was first, and whose programs were or are praiseworthy for various reasons or innovations. There can be similar debates as to which jurisdiction was last to adopt.<sup>94</sup> Many focus upon Mississippi in 1948 as the "last state." Hawaii became a republic in

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<sup>86</sup> The Woman Behind the New Deal, Francis Perkins Center, <https://francesperkinscenter.org/learn/her-life/>

<sup>87</sup> *Id.*

<sup>88</sup> *Number of military fatalities in all major wars involving the United States from 1775 to 2023*, Statista, <https://www.statista.com/statistics/1009819/total-us-military-fatalities-in-american-wars-1775-present/>

<sup>89</sup> Progressive Ideas, United States Department of Labor, ("In 1902 Maryland became the first state to pass a law providing accident compensation regardless of fault, but the law was declared unconstitutional in 1904") <https://www.dol.gov/general/aboutdol/history/mono-regsafepart06#>

<sup>90</sup> *See* note 68.

<sup>91</sup> *Id.*

<sup>92</sup> *See* note 72.

<sup>93</sup> *Id.*

<sup>94</sup> Price V. Fishback And Shawn Everett Kantor, *The Adoption Of Workers' Compensation In The United States 1900-1930*, *Journal of Law and Economics*, vol. XLI (October 1998)("1910 New York; 1911 California, Illinois, Kansas, Massachusetts, Nevada, New Hampshire; New Jersey, Ohio, Washington, Wisconsin; 1912 Maryland, Michigan, Rhode Island; 1913 Arizona, Connecticut, Iowa, Minnesota, Nebraska, Oregon, Texas, West Virginia; 1914 Louisiana, Kentucky; 1915 Colorado, Indiana, Maine, Montana, Oklahoma, Pennsylvania, Vermont, Wyoming; 1917 Delaware, Idaho, New Mexico, South Dakota, Utah; 1918 Virginia; 1919 Alabama, Missouri (ratified 1926), North Dakota, Tennessee; 1920 Georgia; 1929 North Carolina; 1935 Florida, South Carolina; 1939 Arkansas; 1948 Mississippi"). Hawaii became a state in 1959.

1894, and a U.S. territory in 1900.<sup>95</sup> As a territory, it adopted workers' compensation in 1915.<sup>96</sup> Alaska became a territory upon purchase in 1867,<sup>97</sup> and similarly adopted workers' compensation in 1915.<sup>98</sup> Each achieved statehood in 1959. Thus, Alaska is arguably the "last state" to adopt. Though workplace injury benefits existed previously (under the federal Longshore and Harborworkers' Act), workers' compensation *per se* came to Washington D.C. in 1979.<sup>99</sup> So, if the debate is about "jurisdiction," then Mississippi may make yet another valid claim to not being last.

### **Statutory Construct**

The "Great Trade Off" or "Grand Bargain" essentially statutorily alters the contract between employers and employees. It has been labeled a legislative contract, a nod to the governmental imposition. Some state's laws began as voluntary provisions, allowing both employees and employers to elect to participate. Most states evolved to mandatory coverage for at least some population. Texas is the solitary exception; participation there remains voluntary, at the discretion of the employers who "subscribe" or not. In other states, there are broad provisions that include employers that employ some volume of employees (four or more is a common theme). However, each state's law may include specific exceptions for particular occupations or vocations, and exclusion of independent contractors is common. Similarly, it is common to exclude agricultural work, specific part-time work, and domestic work. The challenges of various definitions for "employee" and "independent contractor" have remained through the years and more so in the age of "gig work" and the advantages of the information revolution.

There is diversity among the states as regards what events or injuries are subject to workers' compensation laws. Those subject to the law are labeled "compensable," and questions about inclusion are often termed "compensability" disputes. These can focus on the nature of the injury, the circumstances of the event (accident), and even distinctions between physical and emotional injury.

### **The Benefit Structures**

The state programs define and mandate the delivery of medical care for work injuries. There is variety in whether treating physicians are selected by the injured worker or the employer. There are challenges in the manner in which jurisdictions strive to constrict medical costs through legislative and regulatory efforts. Medical care for compensable injury is generally a lifetime entitlement, but the laws may allow interruption or

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<sup>95</sup> *Annexation of Hawaii, 1898*, United States Department of State, <https://2001-2009.state.gov/r/pa/ho/time/gp/17661.htm>

<sup>96</sup> *About Workers' Compensation*, State of Hawaii, Disability Compensation Division, <https://labor.hawaii.gov/dcd/home/aboutwc/#:~:text=The%20Hawaii%20WC%20law%20was,suffer%20a%20work%2Drelated%20injury.>

<sup>97</sup> *Purchase of Alaska, 1867*, United States Department of State, <https://history.state.gov/milestones/1866-1898/alaska-purchase>

<sup>98</sup> See note 72.

<sup>99</sup> Department of Employment Services, Office of Workers' Compensation, The District of Columbia Workers' Compensation Act of 1979, D.C. Law 3-77; [https://does.dc.gov/sites/default/files/dc/sites/does/page\\_content/attachments/OWC%20Employer%20brochure.pdf](https://does.dc.gov/sites/default/files/dc/sites/does/page_content/attachments/OWC%20Employer%20brochure.pdf)

termination of care. In some jurisdictions, the parties may compromise (settle) the entitlement to future care and treatment. There are inherent difficulties in the manner that workers' compensation medical care may implicate or complicate other similar benefits from health insurance, Medicare, Medicaid, and more.

The various systems provide benefits to replace a portion of wages lost because of compensable injury. These are generally calculated in a manner that results in benefit payments being notably less than pre-injury earnings. However, there are exceptions. The adequacy of such lost earnings (indemnity) benefits has been long debated by the workers' compensation community. While there are distinctions between states, it is common for various benefits to be due for "temporary" disability as medical professionals strive to remediate injury (remedial care). Following the end of that remediation, a point usually labeled "maximum medical improvement," the systems generally have some form of "permanent" disability benefit. Each of these categories may be further divided by law into "total" and "partial" categories. Though medical care entitlement continues during the permanent period, it is generally intended for relief of symptoms instead of remediation, and is sometimes labeled "palliative" care.

### **Someone has to Pay**<sup>100</sup>

In any instance of injury, there is likelihood that care and treatment will be required. In many instances, absence from work will be required. Whether that loss is compensated directly (employer), through insurance (carrier), or by the injured person, someone is paying for the injury and results. In the event a worker lacks access to any program or insurance or other funding, it is possible that the "payment" is not monetary per se. In such an instance the "payment" may be in ongoing symptoms, unremedied disability, and financial loss. Someone, somehow, is paying for injury, illness, and disability.

Workers' compensation socializes a great deal of that loss through mandated participation of employers and employees. The cost of injury in participating work is socialized as a "cost of doing business" similar to any other resource invested in the delivery of any good or service. Therefore, anything consumed in America likely has many layers of workers' compensation cost included in it. When ore is mined, trucked, shipped, smelted, shaped, trucked, stamped, assembled, and becomes a vehicle that is trucked, marketed, and sold, there is potential for workers' compensation coverage for a wide assortment of workers in each phase or step, and a cost added for the potential risk of injury for each.

The probabilities of injury in various occupations are studied. Actuaries are needed. The regulations on employers and insurance companies require persistent monitoring and revision. Analysts, managers, regulators, and more are needed. The delivery of medical care requires willing and able physicians, physician assistants, and nurses. Medical professionals are needed. The delivery of benefits requires analysis and documentation. Claims adjusters are needed. Disputes arise and require investigation, documentation, and litigation. Attorneys are needed. Businesses must focus on the prevention of injury and the finances of socializing cost and loss. Risk managers and safety professionals are

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<sup>100</sup> David Langham, *Someone Has to Pay*, Florida Workers' Compensation Blog, May 26, 2016; <https://dwwlangham.blogspot.com/2016/05/someone-has-to-pay.html>.

needed. Social workers, therapists, mental health professionals, rehabilitation experts, accountants, and actuaries are needed.

Workers' compensation offers a broad spectrum of vocational and career opportunities. The socialization of risk, the safety of the workplace, and the management of risk and loss are challenging, rewarding, and available.